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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CYNTHIA CANADY, *et al.*,
Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY LIBERTY MUTUAL INSURANCE COMPANY AND OLD RELIABLE CASUALTY COMPANY

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Respondents: Allstate Insurance Company; American Economy Insurance Company; American Family Mutual Insurance Company; American States Insurance Company; American States Preferred Insurance Company; Farm Bureau Town & Country Insurance Company; Farmers & Merchants Insurance Company; Farmers Insurance Exchange; Federal Insurance Company; Fire Insurance Exchange; Liberty Mutual Insurance Company; Mid-Century Insurance Company; Old Reliable Casualty Company; Pacific Indemnity Insurance Company; Prudential Property & Casualty Company; Safeco Insurance Company; Sea Insurance Company of America; Shelter General Insurance Company; Shelter Mutual Insurance Company; State Farm Fire and Casualty Company; State Farm General Insurance Company; Sun Insurance Office of America, Inc.; Vigilant Insurance Company.

This Opposition is filed on behalf of respondents Liberty Mutual Insurance Company and Old Reliable Casualty Company.

Subsidiaries of Liberty Mutual Insurance Company are:

St. James Realty Corporation
Subsidiary St. James Management Company Ltd.
Cascade Rehabilitation Counsel
Liberty Northwest Insurance Co.
Subsidiary - Helmsman Management Services
Subsidiary - Liberty Health Plan, Inc.
Steinroe Services, Inc.
Subsidiary - Stein Roe & Farnham Incorporated
Liberty Insurance Corporation
Keyport Life Insurance Company
Subsidiary - Keyport Financial Services Corporation
Subsidiary - Keyport Advisory Services, Inc.
Helmsman Management Services, Inc.
Liberty Life Assurance Company
Helmsman Insurance Agency, Inc.
Liberty Mutual Equity Corporation
Subsidiary - Liberty Real Estate Corporation
Subsidiary - Liberty Financial Services, Inc.
Subsidiary - Liberty Investment Services, Inc.
Subsidiary - Liberty Securities Corporation
Subsidiary - Liberty Investment Services, Inc.
Subsidiary - Liberty Financial International
Subsidiary - Liberty Asset Management Company
Subsidiary - Copley Venture Capital, Inc.
Liberty Lloyds of Texas Insurance
Liberty Mutual Capital Corporation
Liberty Housing Corp.
Liberty Mutual Property-Casualty Company
LM Insurance Corporation
First Liberty Insurance Corporation
LRE Properties, Inc.

Liberty Funding, Inc.
Liberty Energy Corporation
    Subsidiary - Liberty Energy Gulf Corporation
Weston Agency Services, Inc.
Liberty International Holding Company
Atlantic Health Group, Inc.
    Subsidiary - Georgia Health Group PC, Inc.
Liberty Real Estate
Workwell Health & Safety, Inc.
Datachem Software

Old Reliable Casualty Company is a wholly owned subsidiary of The Reliable Life Insurance Company.

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Statement Of The Case

Petitioners' statement of the case is incomplete and, in some respects, quite misleading. Liberty Mutual Insurance Company (Liberty Mutual) and Old Reliable Casualty Company (Old Reliable) will therefore supply their own statement of the case.

This case purports to be a class action under the Fair Housing Act (FHA), 42 U.S.C. § 3601, *et seq.* Petitioners allege that they reside in minority neighborhoods, primarily in Kansas City, Missouri. Defendants are 23 insurance companies that offer homeowners insurance in Missouri. The Complaint alleges that defendants have adopted underwriting practices that reduce the availability and increase the cost of insurance in minority neighborhoods. Petitioners claim that these practices violate the FHA, on both disparate treatment and disparate impact theories.

The individual defendants' practices, and the number of policies sold in minority neighborhoods, vary widely. For example, one of petitioners' experts testified that Liberty Mutual sold a statistically significant excess number of basic homeowners policies in minority neighborhoods. D.App. 1.[1] Old Reliable sells a different type of insurance than the other defendants. It sells dwelling fire policies that do not include liability coverage or replacement value coverage. Thus, Old Reliable does not use any of the underwriting criteria that petitioners challenge. Old Reliable writes the majority of its business in minority neighborhoods. Its rates depend solely upon the level of fire protection in the area where the insured home is located and its rates in minority neighborhoods in Kansas City and St. Louis are the lowest rates it charges anywhere.

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[1] In the appendix to this brief, Liberty Mutual has reproduced portions of the appendix filed in the court of appeals. See references to D.App._.

None of the named plaintiffs either purchased or attempted to purchase insurance from Liberty Mutual.[2] Liberty Mutual therefore filed a motion to dismiss for lack of standing. Petitioners argued that they did have standing based on indirect injury. Their theory was that Liberty Mutual had discriminated against other persons not party to the lawsuit and that such discrimination caused petitioners both economic and non-economic injury. App. 271; 29a-30a, *citing Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 422-23 (4th Cir. 1984). Accepting those allegations as true, the District Court held that it was "conceivable" that petitioners had standing, and denied the motion. App. 30a.

The parties then commenced discovery on petitioners' motion for class certification. While petitioners assert that this discovery was "limited," Pet. at 4, it involved the production of tens of thousands of pages of documents by defendants and more than fifty depositions, including four experts for petitioners. The parties submitted a substantial portion of this evidence to the District Court in conjunction with the class certification issues.

The parties' class certification submissions clarified petitioners' theory of indirect injury in two important respects. First, petitioners proposed to establish that injury on a metropolitan-wide basis, instead of a neighborhood-by-neighborhood basis. Petitioners proposed a class consisting of every person residing in any zip code that was more than 50% minority. They alleged that they had proven indirect injury to "every person owning a home in the affected minority neighborhood, regardless of each person's individual experiences or ability to obtain insurance." App. 9a. In short, they proposed to argue that alleged discrimination against one person in one zip code indirectly injured

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[2] Earlier versions of the complaint alleged that one plaintiff had obtained insurance from Liberty Mutual. In discovery, Liberty Mutual established that this allegation was the product of a mistake. The Third Amended Complaint does not allege that any plaintiff had any contact with Liberty Mutual.

persons residing in other zip codes many blocks or even miles away.

Second, petitioners proposed to establish this allegation via expert testimony that rested on pure speculation. Their expert, Dr. Gregory D. Squires, submitted an expert report alleging that such discrimination is "a contributing cause" to the "deterioration of minority communities." D.App. 2. Dr. Squires acknowledged that there were many other causes for such deterioration and that he could not quantify the impact of the alleged insurance discrimination. D.App. 3. Moreover, Dr. Squires' opinions were generic rather than specific. He has engaged in no "studies of housing or insurance or any other features of St. Louis and Kansas City." D.App. 4. He was not familiar with the various neighborhoods of St. Louis or Kansas City, D.App. 5, and his opinion would be the same for a lawsuit involving minority neighborhoods in Kansas as it would be for Missouri. D.App. 6. In short, petitioners proposed to establish their indirect injury standing by an expert who had made no study whatever of the communities on which he was opining and who could not possibly quantify the impact of the alleged insurance discrimination.

Based on these submissions, the District Court concluded that petitioners had failed to prove the indirect injury they had alleged. App. 9a. As a result, the District Court concluded that petitioners lacked standing to bring claims against defendants against whom they alleged no direct injury. App. 20a. The District Court dismissed the Complaint, without prejudice to plaintiffs' refiling against defendants as to whom they did have standing. *Id.*

Reasons Why The Writ Should Be Denied

I. The Petition Completely Mischaracterizes The Opinions Of The Courts Below.

The thesis of this Petition is that the courts below held, as a matter of law, that petitioners lack standing to sue defendants against whom they have alleged no direct injury. Pet. at 5; 11-12. This is a complete mischaracterization of the ruling. The District Court found that petitioners lacked standing to sue for indirect injuries *as a matter of fact*, because they "have not borne their burden of proving" that class members in the designated areas had "suffered injury in fact." App. 9a. This Court's precedents are not only consistent with the actual holding; they require it.

Since none of the petitioners ever had any direct contact with Liberty Mutual or Old Reliable, their standing to sue Liberty Mutual and Old Reliable depends entirely on the success of their indirect injury theory. The District Court's order on standing refers to the order denying the motion to dismiss, and recognizes that "an indirect injury is often sufficient to establish standing to sue if the injury is fairly traceable to the conduct of the defendants." App. 18a. In ruling on a motion to dismiss, petitioners were entitled to "every reasonable inference." App. 19a. Dismissal on the pleadings "would have been premature," because "the class was not well-defined and class discovery had not yet taken place." App. 19a.

The order on standing also holds that when the "facts and basis of the litigation become apparent," petitioners are no longer entitled to every reasonable inference. App. 19a, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Rather, they must present evidence proving that they have, in fact, sustained indirect injury. Based on "the proposed class definition as well as the 23(a) factors," the order concludes that "plaintiffs do not have standing." App. 19a.

The discussion of the proposed class definition makes it crystal clear that the basis for this conclusion was that petitioners had failed to prove indirect injury. While petitioners claimed that they had produced evidence of such injury, they "have actually not so proven." App. 9a:

> A class comprised of every predominantly minority zip code in Kansas City and St. Louis is not the "relatively compact neighborhood" envisioned by *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 114 (1979), and plaintiffs have not borne their burden of proving that every person living within a predominantly minority zip code has suffered injury in fact.

Id., citing South Suburban Housing Center v. Santefort Real Estate, Inc., 658 F. Supp. 1450 (N.D. Ill. 1987), *modified on other grounds*, 857 F.2d 1476 (7th Cir. 1988).

In short, the District Court dismissed the action because petitioners could not prove what they pleaded. Each of the cases on which petitioners rely explicitly recognizes that pleading is not a substitute for proof. *Bellwood, supra*, 441 U.S. at 115 ("[t]he adequacy of proof of respondents' standing is not before us"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982) ("in the absence of further factual development, we cannot say as a matter of law that no injury could be proved . . . Under the liberal federal pleading standards, . . . dismissal on the pleadings is inappropriate . . ."); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) ("[i]ndividual injury or injury in fact . . . is alleged here. What the proof may be is one thing"). *Lujan* squarely holds that standing is "an indispensable part of the plaintiff's case" that "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561.

In context, therefore, the opinions below reject petitioners' claims on the facts, not on the law. This Court does "not grant

a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

II. The Courts Below Correctly Applied This Court's Precedents To The Facts Of The Instant Case.

This Court has upheld standing based on indirect injury only within a relatively compact neighborhood. In the instant case, petitioners claimed indirect injury on a metropolitan-wide basis. In other words, they alleged that discrimination against a homeowner in one part of Kansas City indirectly injured other homeowners in entirely unrelated neighborhoods, blocks or even miles away from the site of the alleged discrimination. The courts below properly recognized that any such injury is far too attenuated to be fairly traceable to the alleged discrimination or to be redressed by a favorable judgment.

The "irreducible constitutional minimum of standing contains three elements." *Lujan*, *supra*, 504 U.S. at 560. These are:

A. A concrete and particularized injury in fact;

B. A "causal connection between the injury and the conduct complained of," such that the injury is 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court'"; and

C. Proof that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

Id. at 560-61, *quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976).

In recognition of these principles, this Court has authorized indirect injury standing only for residents of a "relatively compact neighborhood." *Bellwood*, *supra*, 441 U.S. at 114.

Trafficante involved a single apartment complex, albeit a large one. 409 U.S. at 206. *Bellwood* involved a 12 by 13 block residential neighborhood. 441 U.S. at 113.[3] In *Coleman*, this Court expressly rejected the concept of metropolitan-wide indirect injury as a basis for standing:

> It is indeed implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the *entire* Richmond metropolitan area. . . . Our cases have upheld standing based on the effects of discrimination only within a relatively compact neighborhood . . . . We have not suggested that discrimination within a single housing complex might give rise to distinct and palpable injury . . . throughout a metropolitan area.

455 U.S. at 377 (emphasis original) (citations and internal punctuation omitted).

The reason for this rule is obvious. The inference of causation, and the likelihood of redressing indirect injury, become much more speculative when the plaintiff is not an immediate neighbor of the direct victim of alleged discrimination. In *Santefort*, the "neighborhood" encompassed 220 square miles and more than 400,000 residents. In holding that plaintiffs lacked standing to claim indirect injury, the Court concluded:

> The area is too broad, the impact of defendants' conduct too attenuated, the relief requested too narrow to have the effect of creating a stable, racially-integrated community sought by the plaintiffs. There are simply too many intervening

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[3] Petitioners' suggestion that this Court allowed standing to "every homeowner in the Village of Bellwood," Pet. at 9, is just plain wrong. The "target neighborhood" was "only a part" of the Village. 441 U.S. at 113 n.27. This Court held that persons residing outside the target neighborhood, who had not alleged any indirect injury, did not have standing to sue. *Id.* at 112 n. 25.

> factors, historical and empirical, to suggest that the situation might have been better had [defendants] acted otherwise, and might improve were the court to afford relief.

658 F. Supp. at 1459 (citations and internal punctuation omitted).

The instant case presents substantially greater problems of proof, because it involves insurance rather than racial steering. In each of the cases on which petitioners rely, the alleged violation was racial steering by real estate agents of prospective tenants or homeowners. The concrete injury sustained was the loss of the social, economic and professional benefits of living in a racially integrated area. Plaintiffs alleged that the racial steering "is affecting the village's racial composition, replacing what is presently an integrated neighborhood with a segregated one." *Bellwood*, *supra*, 441 U.S. at 110. Assuming they could prove that allegation, plaintiffs' injury was fairly traceable to the challenged conduct and a judgment for plaintiffs would be likely to redress it.

In the instant case, the alleged violation is discrimination in the terms and conditions on which defendants offer homeowners insurance. App. 43a-45a ¶ 48; App. 51a ¶ 83. According to Dr. Squires, the indirect injury allegedly sustained is "the deterioration of minority communities" and defendants' sales practices were a "contributing cause" to those problems. D.App. 2. As even Dr. Squires admitted, there are numerous causes for the decline of the inner city unrelated to the cost or availability of homeowners insurance - job loss, capital flight, government policies, racial steering and mortgage lender discrimination. D.App. 7. As a result, Dr. Squires cannot "quantify the impact insurers have had on the decline" of minority neighborhoods. D.App. 3.

These admissions are fatal to petitioners' theory of standing based on indirect injury:

> Plaintiffs' burden to show causation is unusually heavy; in an area fraught with complex motivations and factors, plaintiffs must show that changing one or two factors would have substantially affected the result. As plaintiffs themselves concede, "one cannot separate out the factor of VA and FHA financing and speculate what would have happened without it." . . . Unfortunately, this is precisely what is required before judicial authority can be exercised.

Jorman v. Veterans Administration, 830 F.2d 1420, 1425 (7th Cir. 1987).

In light of the other causes of community deterioration, Liberty Mutual doubts that any plaintiff could make a non-speculative showing that such deterioration is fairly traceable to alleged insurance discrimination. If such a showing is possible, it has to be evaluated on a block-by-block basis. In the context of insurance, any effort to go beyond one or two blocks produces a constitutionally unacceptable degree of speculation.

By contrast, petitioners propose to find indirect injury on a metropolitan-wide basis. Their theory is that discrimination against a person residing in a minority zip code at, for example, 86th and Troost in Kansas City causes segregation and a deteriorated community in a minority zip code seven miles away at 24th and Brooklyn. There is no conceivable way to prove that causal connection, or that ending the discrimination at 86th Street would have the slightest effect on the 24th Street neighborhood.

There is no foundation whatever for Dr. Squires' opinions on this issue. He has engaged in no "studies of housing or insurance or any other features of St. Louis and Kansas City." D.App. 4. None of his publications rested on "empirical data that was collected out of St. Louis or Kansas City." D.App. 8. He was not familiar with the various neighborhoods of St. Louis or Kansas City. D.App. 5. His opinion would be the same for a lawsuit involving minority neighborhoods in Kansas as it would be for

Missouri. D.App. 6.

In short, petitioners' theory was that they had standing to sue for indirect injury, based on:

A. A legal theory of metropolitan-wide indirect injury, which is wrong as a matter of law; and

B. A factual theory contrived by a one-size-fits-all expert who admittedly could not testify that the relief requested would redress the alleged injury.

Not surprisingly, the District Court held that petitioners had not established an indirect injury sufficient to give them standing to sue Liberty Mutual or Old Reliable. App. 20a.

Conclusion

For these reasons, Liberty Mutual and Old Reliable respectfully pray that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

Deposition of Richard Drogin, taken February 17, 1997:

Q. Let's use Table 1a in Exhibit 401. Would you agree with me that according to your Table 1a in Exhibit 401, Liberty Mutual has a statistically significant excess of Type A policies in areas with over 50 percent minority population?

A. That would be a correct interpretation of this data, yes.

Q. And would you agree with me that in Exhibit 1 - or Table 1b of Exhibit 401, Liberty Mutual, the figures show an excess of Type A policies in high-minority areas defined as over 75 percent minority population, although you don't show that excess as being a statistically significant excess?

A. That's a correct statement.

[Deposition Page 362, lines 7-23]
Appellees' Joint Appendix 2711

Expert Report of Gregory D. Squires, Ph.D.:

14. The lack of affordable insurance coverage in minority neighborhoods has a substantial impact on all persons living in the affected minority areas. Insurance redlining is a contributing cause to the continuing pattern of racial segregation and the deterioration of minority communities found in urban areas throughout the United States, including Kansas City and St. Louis. Insurance redlining makes it more difficult for persons living in minority areas to obtain the credit necessary to purchase homes or to maintain businesses. As stated in 1968 by the President's National Advisory Panel: "[i]nsurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not - and cannot - make loans. New housing cannot be constructed, and existing housing cannot be repaired. New business cannot expand, or even survive." As a result of this lack of credit, areas subjected to insurance redlining deteriorate. Again as stated by the President's National Advisory Panel, "[w]ithout insurance, buildings are left to deteriorate; services, good and jobs diminish. Efforts to rebuild our nation's inner cities cannot move forward. Communities without insurance are communities without hope." Even defendant State Farm has conceded that "there is an urban insurance availability problem which is contributing to and aggravating the overall urban problem." The final result is an overall diminishment of property values, and a damage to quality of life.

[Report ¶ 14]
Appellants' Substituted Separate Appendix 590-91

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Now, you've mentioned that there were a series of contributors to the damage then suffered by the minority neighborhoods in St. Louis and Kansas City. You've said in the Milwaukee deposition that one cannot rank how significant the role of insurance companies has been relative to other actors, but would say that it is significant - that its significance is due to the financial side of the industry. You can't quantify the impact insurers have had on the decline or would have had if they acted differently. Do you recall that testimony?

A. I do.

Q. And is that an accurate statement of your views today?

A. Yes, yes. Could I - I want to be clear. I haven't reread that statement, but -

Q. Do you want to?

A. Well, what I'm saying is, if one were to generate a list of every conceivable factor - which I believe we did not do in that context - I'd be prepared to start ranking. But you mentioned three or four other factors and I would concur that among those factors, that I would not want to do the kind of ranking that I indicated in that statement. So that would hold - my opinion would hold today as it did then.

Q. And you also said there that what is more difficult to discern is the precise forces that are responsible for the decline in these neighborhoods. That - is that also true in your view today?

A. Well, yes, but. I mean, again, literally, yes, that's true, but that - without reading the full context in which that was said, I don't want to suggest that we are in - we are unknowing about the kind of forces that affect, or have affected, urban development.

[Deposition Page 108 line 17 through Page 110 Line 6]
Appellees' Joint Appendix 1903-05

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Have you conducted any studies of housing or insurance or any other features of St. Louis and Kansas City, specifically?

A. No.

[Deposition Page 47 lines 14-17]
Appellees' Joint Appendix 1888

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Are you familiar with the various neighborhoods in St. Louis and Kansas City?

A. No.

[Deposition Page 58 lines 15-17]
Appellees' Joint Appendix 1894

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Okay. And if a lawsuit were filed tomorrow in the state of Kansas, rather than Missouri, naming any of these defendants, Paragraph 14 would still be the same for you, right?

A. Well, if the information that I had on them was similar to the information that I've been given on these 13, probably the same.

[Deposition Page 187 line 22 through Page 188 line 3]

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. And you also said that what is more difficult to discern is the precise forces that are responsible for the decline in these neighborhoods. That - is that also true in your view today?

A. Well, yes, but. I mean, again, literally, yes, that's true, but that - without reading the full context in which that was said, I don't want to suggest that we are in - we are unknowing about the kind of forces that affect, or have affected, urban development.

Q. Okay. You were asked what the primary forces were as causes of these damages, and you said that - I'm quoting to you from Page 324 of your deposition - "I think the job loss, the flight of particularly manufacturing industries and other firms out of the city, the flow of capital, the movement of capital from central cities to suburban areas and increasingly other regions of the country and around the world, government policy, often encourages and reinforces a shift of private resources. I think that certainly in terms of the issue of racial segregation, steering practices by realtors, the use of race in appraisals of property and the role of insurance in mortgage lending discrimination, zoning ordinances, zoning rules by all levels of government, have contributed to a segregation."

Do you remember that testimony, or is that still your - still your view?

A. That is certainly roughly still my view, and I think I do remember it.

[Deposition Page 109 line 21 through Page 111 line 4]
Appellees' Joint Appendix 1904-06

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Now, flipping back to your CV again, I think you probably just answered the question but just to be sure, you list a host of publications beginning on Page 2 and running for several pages. Do any of those address Kansas City or St. Louis, specifically?

A. The answer to that is yes and no. I mean, none of those, as I recall, are based on empirical data that was collected out of St. Louis or Kansas City, but the issues that are addressed in each of these studies, in many cases we have maintained that these issues are clearly not unique to the city from which the data came from. And in the literature reviews, we may have drawn from studies that have - that were done in Kansas City or St. Louis. I don't know for sure.

[Deposition Page 48 lines 8-24]
Appellees' Joint Appendix 1889